A

Public Prosecutor v Arokiasamy a/l Alphonso

B HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO MT2–45–3 OF 2001
KANG HWEE GEE J
18 JANUARY 2008

C *Criminal Law — Penal Code — s 84 — Whether element of mens rea present on facts — Whether accused could avail himself of defence of legal insanity*

D *Criminal Procedure — Prosecution — Prima facie case — Whether prosecution made out prima facie case — Whether statement obtained by any inducement, threat or promise proceeding from police officer to whom it was given — Admissibility of oral statement given by accused — Whether oral statement amounted to admission — Criminal Procedure Code s 180*

E *Evidence — Confession — Made to police officer — State of mind of accused when alleged statement obtained — Whether confession made voluntarily — Evidence Act 1950 ss 17(2), 24*

F

The accused was charged under s 302 of the Penal Code ('the Code') for murdering one Ganam a/p Sinnasamy ('the deceased') on 19 July 2000. The accused surrendered himself at the Johor Bahru police station and confessed that he had killed his sister-in-law. The prosecution rested its case
G on the confession and possession of the corpse by the accused. Further, the prosecution relied on the abundance of collaborative evidence to support the confession — the fact that his clothing was stained with blood, the recovery of the blood stained knife, the possession of the corpse by the accused and its delivery to the Inspector at the police station and that the multiple stab
H wounds on the body of the deceased were indicative of the fact that they could only have been inflicted by the doer with the intention of causing death. In this regard, the court was satisfied that there was a prima facie case for the accused to answer pursuant to s 180 of the Criminal Procedure Code, requiring him to enter his defence on the charge.

I

Held, acquitting the accused:

(1) For a confession to be admitted, the prosecution needed to show that

the statement was made voluntarily and that it was free of the strictures imposed under s 24 of the Evidence Act 1950 (see para 20).

(2) The accused had never been arrested, detained or investigated by the police before the incident. He had volunteered the statement to Inspector Tha Na Sak and the words that the accused uttered to the Inspector were spontaneous and before there was time for the Inspector to administer a caution. The accused was clearly in good physical condition, conscious and rational when he made the statement. Having considered the circumstances under which the statement was given, there was no reason to reject it (see para 20).

(3) To decide whether to admit and accept the statement as a confession, one need not go so far as to enquire into any private reasons which may have caused or influenced him to make the confession. Where the decision to admit the confession is made without a voir dire hearing as in the instant case, it would be open to the accused (in the event that he is called to enter his defence) to offer any evidence to show that it may be unsafe to accept his statement as a confession (see para 21).

(4) It was the test of legal insanity and not medical insanity that the accused in this instant case must be subjected to. To decide whether the accused was legally insane under s 84 of the Code, it would therefore be necessary to ask whether at the time he caused the death of the deceased, the accused was suffering from a disease of the body that caused the mind to suffer such a defect of reason that he did not know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong (see paras 42–43).

(5) The accused on the facts had succeeded in discharging the burden of proving, on a preponderance of probability, that he was in the state of mind of not knowing that what he was doing was wrong and therefore legally insane when he committed the act (see paras 44–45).

(6) Further, there was an absence of a motive as to why the accused would want to kill the deceased in this case, which would constitute an important indication of insanity (see para 52).

[Bahasa Malaysia summary

Tertuduh telah dituduh di bawah s 302 Kanun Keseksaan ('Kanun tersebut') kerana membunuh seorang bernama Ganam a/p Sinnasamy ('si mati') pada 19 Julai 2000. Tertuduh menyerah diri di balai polis Johor Bahru dan membuat pengakuan bahawa beliau telah membunuh kakak iparnya. Pihak pendakwaan menyandarkan kesnya kepada pengakuan yang dibuat dan pemilikan mayat oleh tertuduh. Selanjutnya, pihak pendakwaan menyandar kepada bukti sokongan yang banyak untuk menyokong pengakuan tersebut

— hakikat bahawa bajunya berlumuran darah, penemuan pisau berlumuran darah, pemilikan mayat oleh tertuduh dan penghantarannya kepada Inspektor di balai polis dan luka tikaman yang banyak pada mayat adalah penunjuk bahawa ia hanya dapat dilakukan oleh pelaku yang mempunyai niat untuk menyebabkan kematian. Sehubungan itu, mahkamah berpuashati bahawa terdapat kes prima facie untuk tertuduh menjawab menurut s 180 Kanun Acara Jenayah, yang memerlukannya memasukkan pembelaan ke atas pertuduhan tersebut.

Diputuskan, membebaskan tertuduh:

(1) Untuk sesuatu pengakuan diterima, pihak pendakwaan perlu menunjukkan bahawa kenyataan tersebut dibuat secara sukarela dan ia adalah bebas dari sekatan yang dikenakan di bawah s 24 Akta Keterangan 1950 (lihat perenggan 20).

(2) Tertuduh tidak pernah ditangkap, ditahan atau disoalsiasat oleh pihak polis sebelum kejadian. Beliau telah memberi kenyataan secara sukarela kepada Inspektor Tha Na Sak dan kata-kata yang diucapkan oleh tertuduh adalah secara spontan dan sebelum sempat bagi Inspektor memberikan amaran. Tertuduh adalah jelas dalam keadaan kesihatan yang baik, sedar dan rasional semasa beliau membuat keterangan tersebut. Setelah mengambilkira keadaan di mana keterangan tersebut dibuat, hakim yakin bahawa tiada sebab untuk menolaknya (lihat perenggan 20).

(3) Untuk memutuskan sama ada untuk mengakui dan menerima kenyataan tersebut sebagai satu pengakuan, seseorang tidak perlu pergi jauh untuk bertanyakan sebarang alasan yang peribadi yang mungkin akan menyebabkan atau mempengaruhi beliau membuat pengakuan. Di mana keputusan untuk menerima pengakuan tersebut dibuat tanpa perbicaraan voir dire seperti dalam kes ini, ia adalah terbuka kepada tertuduh (sekiranya beliau dipanggil untuk membela diri) untuk menawarkan sebarang bukti untuk menunjukkan bahawa ia mungkin tidak selamat untuk menerima kenyataannya sebagai suatu pengakuan (lihat perenggan 21).

(4) Ia adalah ujian kewarasan dari segi undang-undang dan bukan kewarasan perubatan yang tertuduh dalam kes ini tertakluk. Untuk memutuskan sama ada tertuduh tidak waras dari segi undang-undang di bawah s 84 Kanun tersebut, maka wajar ditanya sama ada pada masa beliau menyebabkan kematian si mati, tertuduh mengalami penyakit yang menyebabkan mindanya mengalami kecacatan di mana beliau tidak mengetahui sifat dan kualiti perbuatan

yang dilakukannya, atau jika beliau mengetahuinya, bahawa beliau tidak tahu apa yang dilakukannya adalah salah (lihat perenggan 42–43).

(5) Tertuduh, di atas fakta, berjaya dalam melepaskan beban pembuktian atas banyak kemungkinan bahawa dia berada dalam keadaan minda yang tidak mengetahui bahawa apa yang dilakukannya adalah salah dan oleh yang demikian tidak waras dari segi undang-undang apabila melakukan perbuatan tersebut (lihat perenggan 44– 45).

(6) Selanjutnya, tiada motif kenapa tertuduh ingin membunuh si mati dalam kes ini yang boleh menjadi petanda ketidakwarasan yang penting (lihat perenggan 52).]

Notes

For cases on confession made to police officer, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 732–734.

For cases on prima facie case, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2945–2957.

For cases on s 84 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1338–1347.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Baharom v PP [1960] MLJ 249 (refd)
Ibrahim v R [1914] AC 599 (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206 (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537 (refd)
Kenneth Fook Mun Lee v PP [2007] 1 MLJ 334 (refd)
Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130 (refd)
McNaghten's Case [1843–1860] All ER 229 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
PP v Kenneth Fook Mun Lee (No 1) [2002] 2 MLJ 563 (refd)
PP v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274 (refd)
PP v Mohamed Noor bin Jantan [1979] 2 MLJ 289 (refd)
PP v Muhamad Suhaimi bin Abdul Aziz [2004] 1 CLJ 378 (refd)
R v Kemp (1956) 40 Cr App R 121 (refd)
R v Matheson [1958] 2 All ER 87 (folld)
R v Quick (1973) 57 Cr App R 722 (refd)
Subramania Iyer 1960 KLT 116 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)
Yeo Ah Seng v PP [1967] 1 MLJ 231 (refd)

Legislation referred to

Criminal Procedure Code ss 180, 342, 347, 348
Evidence Act 1950 ss 17(2), 24
Penal Code ss 84, 300 Exception 1, 300 Exception 4, 302

A

Rashid Sudin (Juanita with him) (Johor Legal Advisor Office) for the prosecution.
Norman J Fernandez (Ashekin, Norman Fernandez & Associates) for the accused.

B **Kang Hwee Gee J:**

THE CHARGE

C **[1]** The accused was charged under s 302 of the Penal Code with the murder of Ganam a/p Sinnasamy ('deceased') on 19 July 2000 between 9.30pm to 11pm in a car at Jalan Berjaya 8, Taman Perindustrian Berjaya, Tampoi, Johor Bahru.

D THE NARRATIVE

[2] The time was 10.30pm on the night of 19 July 2000. Inspector Tha Na Sak ('PW8') was on duty as an investigating officer at the Johor Bahru police station. He was in the company of Sargeant Soo, Detective Corporal Shafee,
E Lans Corporal Kulai, and Lans Corporal Kamal at his office at the police station.

[3] The accused suddenly appeared at the office of Inspector Tha Na Sak
F and proceeded straight to his desk. His shirt was stained with blood and he was shivering. When Inspector Tha Na Sak asked him why he was shivering, the accused answered that he had killed his sister-in-law.

[4] The accused then led Inspector Tha Na Sak to a green Proton Tiara car
G parked outside his office. Inside the car at the front passenger seat was the dead body of a woman of Indian descent, the victim in this case. Her head was leaning onto the side glass window of the said car. There were slashed marks on her neck and blood stains on her dress. A kitchen knife stained with blood lay at foot-well on the driver's side of the car.

H

[5] Inspector Tha Na Sak then contacted ASP James a/l Jonathan who arrived soon after to assume the duty of investigating officer in this case. On the instruction of ASP James the accused was arrested and handcuffed by Inspector Tha Na Sak. He was brought back to the same room where he first
I met Inspector Tha Na Sak for interrogation.

[6] Soon after the accused brought a police party led by ASP James to Jalan Berjaya 8, Taman Perindustrian Berjaya, Tampoi, about 10km from the police station allegedly the place where he committed the act.

[7] Upon returning to the police station Inspector Tha Na Sak took possession of the clothing the accused was wearing, the knife and the car which was later ascertained to belong to the accused. The blood stain on the knife was later found by the government chemist to be of the same group AB, as the deceased's, suggesting that it was the murder weapon.

[8] Post mortem on the body of the victim was conducted on 20 July 2000 by Dr Shahidan Mohd Noor, the pathologist from the Sultanah Aminah Hospital, Johore Bharu.

[9] On external examination of the body, Dr Shahidan found:

(a) an incised wound 3 x 0.5cm and 2cm deep on dorsum base of left thumb;

(b) an incised wound 5.5 x 1.5cm and 1cm deep on outer lower one-third of left forearm;

(c) an incised wound 10 x 2.5cm and 4cm deep on back of left arm;

(d) a stab wound 3 x 1.6cm and 7cm deep on upper left chest its inner end 3cm above the nipple. It was directed downwards and to the right;

(e) a stab wound composite 8cm one edge the other 3.5cm plus 3cm and 2cm wide near the centre of chest 5.5cm below suprasternal notch and 11cm deep directed downwards and to the right;

(f) a stab wound 3.5 x 0.5cm and 6cm deep obliquely placed on the lower neck to the left suprasternal notch;

(g) an incised wound 9cm gaped 2.5cm and 4cm deep on front lower neck and 2cm above the suprasternal notch evenly placed its left end higher than the right. It severed the trachea, and the right common carotid artery with other vessels and exposed the apical region of right lung;

(h) a superficial incised wound 1.5 x 0.5cm on inner right clavicle, and

(i) a superficial incised wound 3 x 0.5cm on upper right arm near underarm. Rigor mortis was generalised. Hypostatic lividity not apparent.

[10] On internal examination he found the trachea cut completely at a point 6cm below the vocal chords. There was also a cut measuring 3 x 1.5cm on the anterior wall of oesophagus about 8cm below the larynx. The lower part of right sternomastoid muscles were completely severed along with major vessels inner to it. The level of cut was at the thoracic inlet.

[11] Death was attributed to the stab and incised wounds inflicted upon the deceased particularly the incised wound on the lower part of the neck

which severed the airway and major vessels by a sharp instrument such as a knife.

THE CASE FOR THE PROSECUTION

[12] The prosecution rests its case on the confession made to Inspector Tha Na Sak at the police station as described earlier and the possession of the corpus by the accused. Under s 17(2) of the Evidence Act 1950:

> A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

And s 24 of the Evidence Act 1950 provides that:

> A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

[13] The classic formulation of the principle applicable to the admissibility of confessions appears in Lord Sumner's speech in *Ibrahim v R* [1914] AC 599 (at p 609):

> It has long been established as a positive rule of English Criminal Law that no statement by an accused is inadmissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

[14] To decide whether or not the prosecution had made out a prima facie case under s 180 of the Criminal Procedure Code, it is therefore necessary to determine as a matter of fact whether the statement was obtained by any inducement, threat or promise proceeding from the police officer to whom it was given 'and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him'.

[15] The admission of the oral statement was at the initial stage objected to by the previous counsel for the accused Mr John Fernandez. Accordingly, voir dire (a trial within a trial) was commenced to determine its admissibility. But Mr Norman Fernandez who took over the conduct of the defence from

Mr John Fernandez later withdrew the objection. The voire dire was discontinued in compliance with what Suffian LP said in *Public Prosecutor v Mohamed Noor bin Jantan* [1979] 2 MLJ 289 that where (at p 290):

> … the defence does not challenge the voluntary nature of the statement there is no reason whatsoever for holding a trial within a trial.

[16] Mr Fernandez informed the court that the defence would concede that the statement made by the accused was made voluntarily without inducement, threat or promise. He said he would nevertheless reserve for submission at the close of the case for the prosecution whether or not the statement should be accepted as a confession.

FINDING AT THE CLOSE OF THE CASE OF THE PROSECUTION

[17] Mr Fernandez's submission in so far as it can be understood is this. Although it was conceded that the accused gave the statement voluntarily, in deciding whether it should be admitted into evidence the court is bound to look into the general condition and mental state of the accused at the time he made the statement. In order to enable the court to do so he submitted that it is incumbent upon the prosecution to adduce all the evidence with respect to:

(i) the altercations at the house of the accused which led the accused to drive away with the deceased in the car in which the body was found. This had surfaced during the cross-examination of the investigating officer when he admitted that the unseen cautioned statement of the accused did allude to such an occurrence.

(ii) the report of the general disposition that the accused when he was sent for initial observation at the Sultanah Aminah Hospital immediately after he was arrested and after his family members arrived at the police station. The same officer had admitted that the accused was sent for initial treatment at the hospital in view of his physical condition at the time.

[18] The failure on the part of the prosecution to adduce such evidence he submitted, must necessarily result in the acquittal of the accused at this stage as the court would not be able under the circumstances to undertake a 'maximal evaluation' of the case for the prosecution to determine whether it should accept the confession.

[19] I am unable to accept that submission. By 'maximal evaluation' is meant a maximal evaluation of whatever evidence that is available before the court at the close of its case and not an evaluation of all the evidence not

A adduced before the court. The prosecution is at liberty to present any evidence which in its view is necessary and sufficient to prove its case (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16), save that an adverse inference may be drawn against it if material evidence which could and ought to be produced is not produced (*Munusamy v Public Prosecutor* [1987] 1 MLJ
B 492).

[20] To be admitted as a confession at this stage the prosecution needs to show that the statement was made voluntarily in the sense that it was free of
C the strictures imposed under s 24 of the Evidence Act 1950, although in the ultimate its admission is still very much at the discretion of the court. Having considered the circumstances under which the statement was given, I am convinced that there is no reason to reject it. The accused had never been arrested, detained or investigated by the police before the incident. He had
D volunteered the statement to Inspector Tha Na Sak having walked into his office on his own accord obviously to surrender himself with the body of the deceased in the car. The words that the accused uttered to the Inspector were spontaneous and before there was time for the Inspector to administer a caution. The accused was clearly in good physical condition, conscious and
E rational when he made the statement.

[21] The fact that he was shivering at the time is to my mind, a natural consequence of being in a state of anxiety after having committed a serious act rather than an indication of irrationality. To decide whether to admit and
F accept the statement as a confession, one need not go so far as to enquire into any private reasons which may have caused or influenced him to make the confession. Where the decision to admit the confession is made without a voir dire hearing as in the present case, it would be open to the accused (in the event that he is called to enter his defence) to offer any evidence to
G show that it may be unsafe to accept his statement as a confession.

[22] I accept the submission of the deputy public prosecutor that it is safe in this case to admit the statement as a confession that he had killed the deceased and that once accepted the accused may be called to enter his
H defence on the charge merely on the confession alone. I agree that there is also an abundance of collaborative evidence to support the confession — the fact that his clothing was stained with blood, the recovery of the blood stained knife; and finally the possession of the corpus by the accused and its delivery to the Inspector at the police station, a piece so strong and telling that the
I accused can be called to enter his defence based on this evidence alone.

[23] I also accept the submission of the deputy public prosecutor that the multiple stab wounds on the body of the deceased were indicative of the fact that they could only have been inflicted by the doer with the intention of

causing death, see *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274; *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174.

[24] I am satisfied that there is a prima facie case for the accused to answer pursuant to s 180 of the Criminal Procedure Code, requiring him to enter his defence on the charge.

THE DEFENCE

[25] The accused did not deny nor admit that he had caused the death of the deceased. He claimed that all he could remember was the preceding event when he was in the car with the deceased. They were engaged in a heated argument. He fell into a state of mindlessness and when he recovered he realised that something had happened to her as she had turned silent and was not responding to him when he called her name.

[26] His account of what transpired is better understood by the transcript of his short testimony as follows:

> I am now aged 57. I am married. My wife's name is Thevasama (produced and identified) and I have 2 children both boys. They are all above 20 years old. I was from Ipoh, Perak originally. I came to JB in the 80's. In the year 2000, I was supplying medical equipments. I was the sole breadwinner and my wife assisted me.
>
> We were staying at house No 30 Jalan Maju Jaya. I, my wife, my two children and the deceased Ganam a/p Sinnasamy were staying in my house with us. She (the victim) was working in a factory in Singapore.
>
> During the time she was staying with us there was no physical violence between us. I had cardiac arrest on 2 May 1998 and had to be revived at the Hospital Sultanah Aminah. I underwent a coronary bypass operation.
>
> Before the heart operation I was self employed as a supplier of medical equipments. Before 1998, I was able to carry out my business well as I was physically stronger. After the heart bypass I had been very stressful and had cardiac neurosis (depression), affecting my ability to carry out my work.
>
> I started a company called Beyond Eng Sdn Bhd before the year 2000. The company was set up to market book stands which I designed myself. I put in all my savings into this business. I went into this business as selling medical equipment was very stressful and I had to think of this product. My sister-in-law (the deceased victim) helped me in this business. I discussed with her and she said she would resign her job in Singapore and join me in this venture. She left her job to join me on 19 July 2000 (the first day she joined me in the business — the day of incident).

A On this day itself she told me that she had changed her mind. An argument took place. I had put all my savings in this business and my physical condition was bad. So an argument started between us at the house. After that I could not take it as my condition was bad. I took my car and she wanted to follow me. On this particular day I took my heart medication but I was still physically unstable. I got in my car and she said she wanted to follow me as a passenger in my car. I do not know where I drove to. While I was driving she kept on arguing, screaming and shouting in the car — windows up.

I cannot remember using any physical violence on her.

C I cannot remember taking with me any knife when I left the house. I never keep a knife in my car for protection.

I only realise something had happened when there was silence in the car. I turned to look at her. He was not responding when I called her name.

D I drove to the hospital but I was confused — so straight away I drove to the police station.

I only drove into the ground of the hospital before I drove her to the central police station. I cannot recollect what happened at the hospital.

E I remember parking my car. I then reported to the police (cannot remember to whom) that someone was hurt in the car.

I can remember the police took me to a room that night. I cannot remember my physical condition. From the police station I was taken to the hospital as I had an unstable angina (of the heart).

F During my argument with her at my house I cannot remember if I had broken things in the house. I cannot remember how long I was driving in the car. When she was shouting she was abusive.

G **[27]** A forensic psychiatrist Dr Badiah binti Yahya of Hospital Permai, Johor Bahru gave evidence to say that the accused was admitted to her hospital on 3 August 2000, 15 days after the event on the order of the Magistrate for medical assessment of his sanity pursuant to s 342 of the Criminal Procedure Code.

H **[28]** The accused was seen on admission by a medical officer Dr Emmanuel Joseph Pereira. Dr Badiah examined the accused on the next day 4 August 2000 using the history taking and mental and physical state examination procedure. She conducted a detailed examination and assessment of the accused on 4 August 2000 and 8 August 2000. In the afternoon of 8 August I 2000 she presented her findings at a grand ward round (attended by other psychiatrists of the hospital including the director also a forensic psychiatrist Dr Benjamin Chan Teck Ming). They concurred with her finding that the accused was not insane at the time he was alleged to have committed the act.

[29] Dr Badiah however made it clear that this unfavorable conclusion was reached based solely on the assessment on whether the accused could have had a 'delusion or hallucination' at the time he committed the act— a very narrow aspect of insanity. An assessment on the other aspects within the *McNaghten's* rule, infra, cannot be accurately conducted by reason that the accused was only admitted to the hospital 15 days after the event. The good doctor however countervailed her own observational opinion of the accused to say that there were known medical cases of patients having fallen into such a state of mindlessness after experiencing a trauma such as after undergoing a serious surgical operation. In the event she was of the opinion that it is not improbable in view of the accused medical history that he may have lapsed into a state of mindlessness as not to have been conscious of what he was doing — an issue which I shall revert to later in this judgment.

WAS THE ACCUSED PROVOKED OR INVOLVED IN A SUDDEN FIGHT?

[30] The submission of counsel for the accused was surprisingly not premised on the defence of insanity but on the submission that at most the accused had committed culpable homicide not amounting to murder under Exception 1 and Exception 4 of s 300 of the Penal Code which read as follows:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other persons by mistakes or accident.
>
> Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in a heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

[31] He justified his submission on the events occurring at the house before the accused left in his car with the deceased where they were engaged in a heated argument when the deceased had screamed and shouted at the accused. The evidence of the wife of the accused, he submits, corroborates the fact that there was such an altercation at the house and there is also a probability of fights having taken place later in the car.

[32] Needless to say the submission is untenable. There is clearly no such evidence of a grave and sudden provocation on the part of the deceased or any such altercation that had led the accused to suddenly kill the deceased in the car. Although there is evidence of some arguments between the deceased and the accused at the house this was hardly sufficient to constitute a 'grave and

sudden provocation' or 'a sudden fight in the heat of passion upon a sudden quarrel' under the two exceptions of s 300 of the Penal Code.

A SERIOUS QUESTION TO BE CONSIDERED

[33] There could be no doubt in my mind that the accused had caused the death of the deceased which in the ordinary course would have resulted in a conviction of murder as charged.

[34] Having heard the evidence of the accused and the evidence of the forensic psychiatrist however, I am convinced that there is a serious question to be considered as to whether the accused could avail himself of the defence of legal insanity under s 84 of the Penal Code. Under the system of common law which we adopted (with the exception of some less serious statutory strict liability offences), an act does not make a person guilty of a crime unless it is committed with a guilty mind. *Actus non facit reum nisi mens sit rea*. I am therefore duty bound as a matter of justice to examine and to consider whether he had or had not that guilty mind (the mens rea) to commit murder under s 302 of the Penal Code notwithstanding that this was not the course taken by his counsel in his submission at the close of the case for the prosecution.

Now, s 84 of the Penal Code provides that:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[35] The section is in fact a codification of the English common law as formulated by the House of Lords in *McNaghten*'s case in 1843. See *Subramania Iyer* 1960 KLT 116, footnote 8 at p 161 in *Ratanlal Law of Crimes* (22nd Ed).

[36] The *McNaghten*'s case laid down the legal test to be applied with respect to a person's state of mind in the defence of insanity as follows:

> To establish a defence on the ground of insanity, it must be really proved that, at the time of the committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

[37] A 'disease of the mind' has been accepted to include not only a disease of the mind per se such as schizophrenia but also a disease of the body that

causes the mind to suffer 'defects of reasons'. Hence in *R v Kemp* (1956) 40 Cr App R 121 the hardening of the arteries in the body is accepted by Devlin J:

> as a disease on the evidence capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, and thus is a disease of the mind within the meaning of the rule.

[38] The test was refined in the later Court of Appeal case of *R v Quick* (1973) 57 Cr App R 722 (CA) where an aggravated assault committed by a diabetic while in a state of *hypoglycaemia* caused by the insulin he had taken, the alcohol he had consumed and by not eating his meal was held not to have been caused by a disease of the mind since the immediate condition was caused by external factors. This was what the English Court of Appeal said:

> Our task was to decide what the law now means by the words 'disease of the mind'. In our judgment the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factors such as violence, drugs, including anesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike death caused by defect of reason from disease of the mind, will not always relive an accused from criminal responsibility. A self induced incapacity will not excuse nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as for example taking alcohol against medical advice after using certain prescribed drugs or failing to have regular meals whilst taking insulin. From time to time difficult borderline cases are likely to arise. When they do, the test suggested is likely to give the correct result, viz can this mental condition be fairly regarded as amounting to or producing a defect of reason from the disease of the mind.

[39] In our own jurisdiction the defence of insanity caused by hypoglycemia was raised and considered in *Public Prosecutor v Kenneth Fook Mun Lee (No 1)* [2002] 2 MLJ 563.

[40] In that case the accused had for no apparent reason fired his pistol and killed the deceased when she disobeyed his instruction to come out of her car in a busy Kuala Lumpur street. He had earlier merely fired two shots into the air when a motor cyclist sped away and had shot the deceased only because she had disobeyed his instruction. The trial judge Augustine Paul J (as he then was) found that 'not all the deliberative functions of the accused's mind were absent' and that 'his mind though impaired, was working well enough to put into effect the thought that had got into him'.

The defence of automatism caused by a disease of the mind brought about by hypoglycemia was rejected. The finding on this point was confirmed on appeal both by the Court of Appeal ([2007] 1 MLJ 334) and the Federal

Court ([2007] 2 MLJ 130) although the acquittal was reversed on other grounds.

WAS THE ACCUSED LEGALLY INSANE?

[41] Turning now to the mental state of the accused in the instant case — it is true that Dr Badiah had concluded that the accused was of sound mind and was not insane when he committed the act and that the grand ward round had concurred with her opinion. By 'sound mind' according to Dr Badiah is meant that he had not suffered from any 'delusion or hallucination' at the time he committed the act. But as Dr Badiah herself admitted, her observation of the mental state of the accused was confined only to discovering whether he was under *a delusion or hallucination* at the material time. It constitutes but an aspect of insanity in the medical sense as opposed to insanity in the legal sense under s 84 of the Penal Code which is concerned with the much broader 'disease of the mind' that leads to a complete absence of mens rea. As Abdull Hamid Embong JCA said in *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 para 15:

> There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) p 280).

[42] It is the test of legal insanity and not medical insanity that the accused in the instant case must be subjected to.

[43] To decide whether the accused was legally insane under s 84 of the Penal Code it would therefore be necessary to ask the same question as in *R v Kemp*: whether at the time he caused the death of the deceased the accused was suffering from a disease of the body that caused the mind to suffer such a defect of reason that he did not know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong or more precisely in the words of Devlin J:

> a disease on the evidence capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, and thus is a disease of the mind within the meaning of the rule.

[44] There is a rebuttable presumption that every person is sane and to have intended the consequence of his act. The burden therefore lies on the accused to prove on a preponderance of probability that he was in that state of mind and was therefore legally insane when he committed the act (see *Baharom v Public Prosecutor* [1960] MLJ 249; restated more recently in *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537).

[45] In my judgment he has succeeded in discharging that burden — for the following reasons:

[46] His claim that he had a serious heart disease and had experienced a change of personality after undergoing heart surgery in 1998 is supported by the evidence of his wife who said he was not a person of an aggressive nature until he underwent the surgery when his personality changed.

[47] So is his claim of having been in that state of mindlessness supported by the expert medical opinion of Dr Badiah. In the course of her examination of the accused, Dr Badiah had obtained the medical notes of the accused from the Cardiothoracic Unit of the Sultanah Aminah Hospital Johor Bahru, the hospital that treated and operated on him in 1998. She was able to confirm from the notes that the accused had a triple vessel disease, unstable angina, poor left ventricular function and left ventricular thrombus and that he underwent surgery on 9 July 1998 at that hospital. She was also able to confirm from her study of him at Hospital Permai that he had depressive symptoms after his cardiac operation. She said it was quite common for patients who undergo a major operation to exhibit such a symptom. In general she said that a chronic depression can cause some social, financial and marital problems and can lead to a tendency to consume alcohol as a means of overcoming the symptoms. A patient who is depressed can easily be angered and become very sensitive and can exhibit an impulsive behavior and suicidal tendency. In the case of the accused she was of the opinion that it was probable for him to be angry and to have mood swings. She could not say for certain on an observational basis whether in this case the accused can have a sudden mental blackout as he was admitted 15 days after the fact. She did say however that generally such a blackout can happen in a patient such as the accused in which may in turn cause him to lose control of himself that he may not have been conscious of what he did.

[48] The prosecution could have called rebuttal evidence to rebut Dr Badiah's opinion but it did not. The question of whether the accused has

successfully discharged the burden of proving that he was legally insane at the time he committed the act would therefore have to be determined mainly from the medical opinion of Dr Badiah.

[49] In such a case where only one medical opinion is available the proper course for the court is to adopt the approach of the English Court of Criminal Appeal in *R v Matheson* [1958] 2 All ER 87 which was followed here by our Court of Appeal in *Public Prosecutor v Muhamad Suhaimi bin Abdul Aziz* [2004] 1 CLJ 378.

[50] In *R v Matheson* the full bench of the English Court of Appeal found it necessary to quash the conviction of the trial court and thereby affording the accused the defence of insanity where no medical evidence was led to rebut the reasoned medical opinions justifying the mental impairment of the accused leading to diminished responsibility. This was what Lord Goddard CJ delivering the judgment of the court said:

> What then were the facts or circumstances which would justify a jury in coming to a conclusion contrary to the unchallenged evidence of these gentlemen? While it has often been emphasised, and we would repeat, that the decision in these cases, as in those in which insanity is pleaded, is for the jury and not for doctors, the verdict must be founded on evidence. If there are facts which would entitle a jury to reject or differ from the opinions of the medical men, this court would not, and indeed could not, disturb their verdict, but if the doctor's evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be 'a true verdict in accordance with the evidence ...
>
> If then there is unchallenged evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility and no facts or circumstances appear that can displace or throw doubt on the evidence it seems to the court that we are bound to say that a verdict of murder is unsupported by the evidence.

[51] In the absence of any evidence in rebuttal in the instant case I am left only with the expert opinion of Dr Badiah to consider. It is true her opinion on this point is at best empirical in the sense that it is given on a fairly general basis and is unsupported by case studies. Nonetheless Dr Badiah is an expert in her field having undergone specialised training overseas before becoming a forensic psychiatrist at the renowned mental hospital where she practiced. I accept her evidence that it was probable for the accused to have fallen into such a state of mindlessness when he committed the act.

[52] Further, there is an absence of a motive as to why the accused would want to kill the deceased in this case. He had denied in cross-examination that the deceased was his lover and that he had killed her because she was leaving him to marry another person from Singapore. Indeed no evidence of such a relationship was ever adduced before the court. The absence of motive or the lack of it was held by the Federal Court in *Yeo Ah Seng v Public Prosecutor* [1967] 1 MLJ 231 at p 233 to constitute 'an important indication of insanity which ought to be brought to the attention of the jury'. The finding was followed more recently by the Court of Appeal in *Public Prosecutor v Muhamad Suhaimi Abdul Aziz* [2004] 1 CLJ 378. In agreeing with the decision of the High Court in finding the accused insane, the court held (per Ariffin Zakaria JCA, as he then was), that:

> In the absence of any rational motive on the part of the accused in killing his wife coupled with the unchallenged medical evidence, we hold that the learned judge was justified in coming to his decision.

[53] A crucial issue that I have to address is the question of whether the unexplained possession of the knife in the hands of the accused should degrade or demolish altogether his claim of being in a state of mindlessness — for had there been some evidence that he had taken that knife into the car or been in possession of it immediately before the event such an occurrence may well have led me to find that there was a pre-meditation of the murder whereby it can be forcefully argued that he could not have been in that state of mindlessness when he committed the act. But no such evidence was proffered. I accept Mr Fernandez's submission that it was equally probable that the deceased herself could have by stealth been in possession of that knife before the event and that it would be wrong to draw any inference of pre-meditation against the accused.

THE DECISION

[54] For the aforesaid reasons I am therefore bound to acquit the accused. In due compliance with s 347 of the Criminal Procedure Code, I so find 'that he had committed the act he is charged with, but by reason of unsoundness of mind, he was incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law'.

[55] In further compliance with s 348 of the same Code, I order the accused to be kept in safe custody at Hospital Permai. The senior assistant

registrar of the court shall report the case for the orders of the Ruler of the State of Johor.

Accused acquitted.

Reported by Dipendra Harshad Rai